87-2075

Supreme Court, U.S.
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No. 88-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

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THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, *et al.*,
*Petitioners*

v.

MEDICAL LAUNDRY SERVICE, A DIVISION OF OPLCO, INC.,
*Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

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## QUESTION PRESENTED FOR REVIEW

Is the breach of a commercial contract a deprivation of a constitutionally protected interest, giving rise to a cause of action under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983, merely because the breaching party is a state agency?

## PARTIES TO THE PROCEEDINGS

Plaintiff

Medical Laundry Service, a
division of OPLCO, Inc.

Defendants

The Board of Trustees of the
University of Alabama
S. Richardson Hill, Jr.
Dennis Sanchez
Vance Alexander
Herman Lazarus
James E. Moon
Bob Cummings
Clark Taylor
Lester Elliot
Martin Novak

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v.

MEDICAL LAUNDRY SERVICE,
A DIVISION OF OPLCO, INC.,
*Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

Petitioners, The Board of Trustees of the University of Alabama, *et al.*, respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on March 23, 1988. Petitioners further respectfully request that the Court reverse the decision of the court of appeals.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Medical Laundry Service v. Board of Trustees of University of Alabama*, 840 F.2d 840 (11th Cir. 1988) (App. at 1a). The opinion of the district court, reproduced in the appendix at 9a, was not reported.

### JURISDICTION

The opinion of the Court of Appeals was filed on March 23, 1988. No petition for rehearing or suggestion for rehearing en banc was filed.

This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1254(1) and § 2101(c).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes, and regulations involved are: The Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 1983, Section 14 of the Constitution of Alabama of 1901, and § 41-9-60, § 41-9-61, § 41-9-62(a)(5)(b), § 41-9-66, and § 41-9-68 of the Code of Alabama (1975).

## STATEMENT OF THE CASE

The Board of Trustees of the University of Alabama ("the Board of Trustees") entered into a contract with Medical Laundry Service ("MLS") whereby MLS would provide laundry service to The University of Alabama Hospital for one year. Service began on or about March 19, 1984, and on April 10, 1984, the Board of Trustees terminated the contract.

On April 10, 1986, MLS filed suit in federal district court against the Board of Trustees and several of its officers and employees who participated in the decision to terminate the contract, claiming a violation of its rights to procedural and substantive due process established by the Fourteenth Amendment to the United States Constitution and protected by 42 U.S.C. § 1983. The claim was based on allegations that the contract with the state entity was a property right protected by the Fourteenth Amendment to the United States Constitution, that no pre-termination hearing was provided, and that an available post-termination procedure in the form of pursuing a claim before the State Board of Adjustment did not meet fundamental due process requirements. The only allegation in the complaint relating to reasons for terminating the contract was that the termination was "wrongful" and "without basis," "shocking the conscience" and thus constituting a violation of substantive due process rights.

Defendants moved for a dismissal on grounds that the court lacked subject matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted, and that principles of collateral estoppel and/or res judicata barred the claim.

The district court concluded that the contract was not a protected property interest because, under Alabama law, the state and its agencies are immune from suit for almost every conceivable action, including actions for breach of contract. The availability of a claims procedure before the State Board of Adjustment was viewed as an act of legislative grace and did not alter the district court's conclusion. Absent a protected property interest, the complaint failed to state a claim for procedural due process. The district court found no support in the record for the substantive due process claim. Summary judgment in favor of defendants was granted.[1]

On appeal, a panel of the Eleventh Circuit, with one judge dissenting, held that, even though the Alabama Constitution made the subject contract unenforceable "in any court of law or equity," the establishment of the State Board of Adjustment and the provisions by which it adjusts claims against the state constitute a set of rules securing the plaintiff's interest in the contract as defined in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Summary judgment for defendants with respect to the procedural due process claim was reversed; summary judgment on the substantive due process claim was affirmed. The case was remanded for further proceedings.

## REASONS FOR GRANTING THE WRIT

The Court should review and reverse the decision of the court below which allows ordinary breach of a commercial contract by a state agency to provide a basis for a cause of action under 42 U.S.C. § 1983.

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[1] Defendant's Motion to Dismiss was treated as a Motion for Summary Judgment. See note 1 in Memorandum of Opinion of District court. App. at 9a.

**I. The Decision Below Expands the Scope of 42 U.S.C. § 1983 Significantly Beyond Its Purpose and Opens a Floodgate to Federal Court as a Substitute Forum for State Contract Actions.**

The decision of the Eleventh Circuit in this case converts every breach of contract by a state agency to a federal civil rights action cognizable under 42 U.S.C. § 1983. Boundaries of federal subject matter jurisdiction created by 42 U.S.C. § 1983 are continually evolving, but no decision of this Court demands or may be reasonably construed to require such broad application of a statute which created a federal right of action largely because:

> (B)y reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

*Monroe v. Pape*, 365 U.S. 167, 180, 81 S. Ct. 473, 480, 5 L. Ed. 2d 492 (1961). In the same opinion, the Court declared that § 1983 is to be interpreted against a "background of tort liability," (*Id.* at 187, 492, 505), but recent opinions of this Court have cautioned that remedies for violations of duties arising from tort law must be sought in state court under traditional tort-law principles. *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

The holding below ignores the decisions of this Court most squarely on point, admittedly early ones, that a suit alleging nothing more than a breach of contract by a municipality or public agency does not state a cause of action for deprivation of property without due process of law. *Manila Investment Co. v. Trammell*, 239 U.S. 31, 36 S. Ct. 12, 60 L. Ed. 129 (1915); *McCormick v. City of Oklahoma City*, 236 U.S. 657, 35 S. Ct. 455, 59 L. Ed. 771 (1914).

Petitioners are acutely aware of the departure from the rule in *Manila Investment* and *McCormick* in cases involving employment of faculty at state colleges and universities. Clearly, tenured employees and others whose employment contracts or terms of employment create an expectation of continued employment absent good cause for dismissal are entitled to due process of law prior to termination of employment. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). The protection applies to other employees of public agencies. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Protection has also been extended to public employment under a term contract. *Vail v. Board of Education*, 466 U.S. 377, 104 S. Ct. 2144, 80 L. Ed. 2d 377 (1984). The reasoning on which this expansion of the common law definition of property is based, however, is peculiarly applicable to contracts of "tenure" and other expectancies to be terminated only for cause and should not be extended to purely commercial contracts for purchase of goods or services. These protected contract rights, characterized by one court of appeals as "human capital," have been adjudged to be substantial enough to warrant federal constitutional protection at least partly because of their uniqueness and peculiar value to the holder. *See Brown v. Brienen*, 722 F.2d 360, 363 (7th Cir. 1983). In addition to the strong interest of a public employee in not being deprived of his livelihood, the facts that such persons are unlikely to have independent means, that adequate compensation for an expectation of permanent employment may not be available in an action for damages, and that explaining the circumstances of losing employment which can only be terminated for cause is a burden weighing in favor of federal constitutional protection. See discussion in *Boucvalt v. Board of Commissioners of Hospital Service*, 798 F.2d

722, 729 (5th Cir. 1986), declining to apply a predeprivation hearing requirement in action by anesthesiologist alleging breach of contract.

The case under consideration here has none of these special characteristics. The complaint alleged that the breach of contract was unfair and arbitrary, but the allegation was conclusory, and no facts explaining or leading to the breach were alleged. The district court found no basis for a violation of substantive due process (App. at 10a, n. 3), and the court of appeals affirmed the judgment. (App. at 5a.) MLS had a contract to provide laundry service to a state university hospital; for reasons not disclosed in the record, hospital administrators terminated the agreement. If the hospital had been private rather than public, the plaintiff clearly would have been limited to a suit for breach of contract. That limitation should apply in a simple breach of commercial contract by a state agency.

Limitation to state contract remedy does not lose its reasonableness even though the Board of Trustees and other state agencies are immune from suit in the state courts. Section 14 of the Alabama Constitution of 1901 bars virtually every suit against the state and its agencies including the Board. *Hutchinson v. Board of Trustees of University of Alabama*, 288 Ala. 20, 256 So. 2d 281 (1971). All persons doing business with the state are charged with knowledge of this situation. *McDowell-Purcell, Inc. v. Bass*, 370 So. 2d 942 (Ala. 1979).

A party contracting with a state agency is not without a vehicle for a breach of contract claim, however. The Alabama State Board of Adjustment was created to hear claims and make awards to enforce the legal and moral obligations of the State of Alabama. Code of Ala. (1975) § 41-9-60 (App. at 15a). It has power to award full compensatory damages for a breach of contract. Code of Alabama (1975) § 41-9-62(a)(5)(b) (App. at 17a) and § 41-9-68 (App. at 18a).

Allowing a federal cause of action for violation of due process whenever a state agency terminates or otherwise allegedly breaches a contract is not reasonable. The holding below will open a floodgate to federal courts as substitutes for state courts or, in the case of Alabama, responsible state agency proceedings. Any doubt that this is so may be resolved by reviewing developments in employment cases. The observation of the Seventh Circuit in *Brown v. Brienen*, 722 F.2d 360, 362 (1983) that "state employees' suits . . . alleging breach of an employment contract have become an important part of the business of federal courts" is hardly news to this Court. The Board of Trustees enters into hundreds of commercial contracts for goods and services for its Birmingham campus alone. This figure multiplied by the number of state universities and other state agencies in Alabama and other states in the Eleventh Circuit demonstrates the enormous potential for adding ordinary commercial contract disputes to the evergrowing case load of the federal courts created by the holding below. The Court should grant *certiorari* to avoid that development.

**II. The Decision Below Is in Conflict With the Decisions of the First, Second, Fourth, and Fifth Circuits.**

Four circuit courts of appeals have held that breach of contract claims, containing no allegation of a special, federally protected interest, which may be compensated in state actions, do not state a cause of action under 42 U.S.C. § 1983. *Boston Environmental Sanitation Inspectors Association v. City of Boston*, 794 F.2d 12 (1st Cir. 1986); *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983); *Casey v. Depetrillo*, 697 F.2d 22 (1st Cir. 1983); *Costello v. Town of Fairfield*, 811 F.2d 782 (2d Cir. 1987); *Coastland Corporation v. County of Currituck*, 734 F.2d 175 (4th Cir. 1984); *Heath v. City of Fairfax*, 542 F.2d 1236 (4th Cir. 1976); *Boucvalt v. Board of Commissioners of Hospital Service*, 798 F.2d 722 (5th Cir. 1986); *Braden v. Texas A & M University System*,

636 F.2d 90 (5th Cir. Unit A, 1981); *Sudeikis v. Chicago Transit Authority*, 774 F.2d 766 (7th Cir. 1985).

Analagously, one circuit court of appeals has held that a governmental agency has not violated fifth amendment due process when it breaches a contract it has entered into in the commercial world. *Schlake v. Beatrice Production Credit Association*, 596 F.2d 278 (8th Cir. 1979).

The fact that most of the courts of appeal which have reached the opposite holding have addressed the question twice, albeit in differing fact situations, is an indication that the question of whether a simple breach of contract by a state agency is a deprivation of due process will continue to arise. Review by the Court to resolve the issue is appropriate and important.

## CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit to consider the issues raised in this Petition.

Respectfully submitted,

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# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 86-7852

MEDICAL LAUNDRY SERVICE,
a division of Oplco, Inc.,
*Plaintiff-Appellant,*

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, BIRMINGHAM; S. RICHARDSON HILL, both as an individual and in his capacity as President of the University of Alabama ("UAB"); DENNIS SANCHEZ, both as an individual and in his official capacity as Assistant Director of the Department of Pharmacy at UAB; VANCE ALEXANDER, both as an individual and in his official capacity as Associate Director of the Department of Pharmacy at UAB; HERMAN LAZARUS, both individually and in his official capacity as Director of the Department of Pharmacy at UAB; JAMES E. MOON, both individually and as Administrator of the University of Alabama Hospitals; BOB CUMMINGS, both individually and as Associate Director of Purchasing at UAB; CLARK TAYLOR, both individually and in his official capacity as Associate Administrator for Operations at UAB; LESTER ELLIOT, both individually and in his official capacity as Supervisor of the Linen Service Department at UAB; MARTIN NOVAK, both individually and in his official capacity as Assistant Administrator for Operations of UAB; *et al.*,
*Defendants-Appellees.*

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March 23, 1988

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Appeal from the United States District Court
for the Northern District of Alabama

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Before RONEY, Chief Judge, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

The issue to be addressed in this opinion is whether plaintiff has a legally protected property interest, which is a prerequisite to plaintiff's procedural due process claim brought pursuant to 42 U.S.C. § 1983. In order to establish a procedural due process claim under the Fourteenth Amendment for deprivation of property, plaintiff must show that its contract with the state constitutes a protected property interest.

Plaintiff Medical Laundry Service held a contract with the University of Alabama in Birmingham for provision of laundry services to University hospitals in Birmingham. The contract was terminated by the Board of Trustees of the University of Alabama approximately one month after performance under the contract had begun. Plaintiff brought suit against the Board of Trustees of the University of Alabama and hospital officials (hereafter referred to collectively as the "State") for violation of plaintiff's procedural and substantive due process rights under § 1983. The district court granted the State's motion for summary judgment on both counts. We find no merit in plaintiff's substantive due process claim and affirm without further discussion the district court's grant of summary judgment on that claim.

The scope of plaintiff's property interest under § 1983 is defined by state law. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976). Article I, § 14 of the Constitution of the State of Alabama provides: "That the State of Alabama shall never be made a defendant in any court of law or equity." The State ar-

gues that plaintiff cannot enforce its contract, *Hutchinson v. Board of Trustees of the University of Alabama*, 288 Ala. 20, 256 So.2d 281 (1971), and thus plaintiff has no enforceable property interest. Without a property interest, plaintiff's procedural due process claim would fail. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The district court, adopting this argument, entered summary judgment for defendant. We reverse.

Although the Alabama Constitution makes the instant contract unenforceable "in any court of law or equity," Alabama has established a Board of Adjustment with jurisdiction to hear such claims. Section 41-9-68(a) of the Code of Alabama provides in relevant part:

> When claims are . . . presented to the board of adjustment . . . it is directed to determine the amount of the . . . damage arising from contract . . . and to award and find the person entitled to payment and the amount, if any, which should be paid . . . .

Section 41-9-69 provides:

> The board of adjustment in its findings of facts and its findings and awards as to the amount of payment may also find the agency, commission, board, institution or department of the state of Alabama which inflicted the injury or damage complained of, if it finds there is injury or damage done to persons or property, and may adjudge and find that said damage shall be paid out of the appropriation made to the agency, commission, board, institution or department of the state of Alabama whose employees, servants, agents or instrumentalities inflicted the damages and injuries complained of; provided, that the board of adjustment may order the payment of any claim out of any fund or funds appropriated for the purposes of this division.

Section 41-9-72 provides:

> The treasurer of the state of Alabama is authorized and directed to pay the warrants of the comptroller, drawn pursuant to the findings and awards of the board of adjustment out of any money in the treasury of the state of Alabama as directed by such findings and awards.

Although the plaintiff cannot enforce its contract in any court of law or equity, Alabama has provided an administrative procedure to "adjust" plaintiff's contract claim. The State argues that the remedy afforded by the Board of Adjustment is a mere privilege, a matter of legislative grace. *John E. Ballenger Construction Co. v. State Board of Adjustment*, 234 Ala. 377, 175 So. 387 (1937). However, the Supreme Court has expressly rejected the State's proposed distinction between a "right" and a privilege. In *Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972), the Court stated: "[T]he court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process." In *Perry v. Sindermann*, 408 U.S. at 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), the Court held:

> We have made clear in *Roth*, *supra* [408 U.S.] at 571-72 [92 S.Ct. at 2706], that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings."

We conclude that the provisions whereby the Board of Adjustment 'adjusts' claims is just such a set of rules securing plaintiff's interest in the instant contract. The fact that the Supreme Court of Alabama has referred to the Board of Adjustment procedures as a mere matter of grace, *Ballenger*, *supra* 175 So. at 390, does not alter our

conclusion. The language of the Alabama statute directs the Board of Adjustment to determine the amount of damage and directs the treasurer of the state of Alabama to pay pursuant to the awards of the Board. Ala. Code § 41-9-68(a), § 41-9-72 (1975). The State has referred us to no authority suggesting that the Board of Adjustment makes determinations in a completely arbitrary manner, and we see no reason to assume that it does.[1]

With respect to plaintiff's substantive due process claim, the district court's grant of summary judgment is affirmed. With respect to plaintiff's procedural due process claim, the district court's grant of summary judgment is reversed.[2]

AFFIRMED in part, REVERSED in part, and REMANDED.

---

[1] The law is clear that decisions of the Board of Adjustment are not appealable. *Moody v. University of Alabama*, 405 So.2d 714 (1981). The fact that its decisions are not appealable does not mean that the Board does not conduct its business in a fair and reasoned manner. In fact, it is directed to follow as a guide the rules of negligence and workmen's compensation, when applicable. *See* Ala. Code § 41-9-68(a).

[2] Other issues, including res judicata, collateral estoppel and the application of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), were neither addressed by the district court nor briefed on appeal, and therefore should be addressed initially on remand.

With respect to Chief Judge Roney's dissent, we agree that a breach of contract is not, in and of itself, a constitutional violation. Although contract rights can be property, a breach of contract by a state does not necessarily amount to a deprivation of property without due process of law. Because we have had no briefing about what process was due to this plaintiff on the termination of the contract or whether Alabama provided due process or denied due process to this plaintiff, we leave it to the district court on remand to consider those questions.

RONEY, Chief Judge, dissenting:

Since plaintiff's claim is nothing more than a claim for breach of contract, I respectfully dissent from the decision that plaintiff has stated a cause of action under Section 1983 for violation of its procedural due process rights.

Plaintiff's Section 1983 claim is predicated on dual assertions: that its contract with the State created a property interest cognizable under the Fourteenth Amendment and that, given the existence of this property right, the State could not terminate the contract without holding a predeprivation hearing.

The plaintiff contends that the contract between plaintiff and the State created a property interest because Alabama law provides a remedy, albeit a very limited one, against the State when it breaches an agreement. The argument is that any time one has an *enforceable* contract to which the State is a party, there is constitutionally protected property interest under that contract. This broad interpretation of what constitutes a federally protected property interest is inconsistent with the concept that "the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts." *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983). Section 1983 relief is predicated on a denial of a right or interest protected by the Constitution. *Baker v. McCollan*, 443 U.S. 137, 138-40, 99 S.Ct. 2689, 2691-93, 61 L.Ed.2d 433 (1979).

The cases are legion which hold that a simple breach of contract by the State does not rise to the level of a constitutional deprivation. *See, e.g., Braden v. Texas A & M University System*, 636 F.2d 90, 93 (5th Cir. Unit A Feb. 1981) ("If the State had merely breached a contract with [plaintiff] he would have no cause of action under Section 1983."); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) ("A contract dispute . . .

does not give rise to a cause of action under Section 1983."); *Boston Environmental Sanitation Inspectors Ass'n v. City of Boston*, 794 F.2d 12, 13 (1st Cir. 1986) ("[A]n alleged breach of contract does not amount to a deprivation of property without due process actionable under § 1983."); *Sudeikis v. Chicago Transit Authority*, 774 F.2d 766, 770 (7th Cir. 1985) ("It has long been settled that a mere breach of contract by the government does not give rise to a constitutional claim."); *Jimenez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981) ("A mere breach of contractual right is not a deprivation of property without *constitutional* due process of law. . . . Otherwise virtually every controversy involving an alleged breach of contract by a government or a governmental institution or agency or instrumentality would be a constitutional case.").

The plaintiff does not allege that its contract was terminated because it had engaged in some constitutionally protected activity. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1973); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2717, 33 L.Ed.2d 581 (1972).

There is no federal constitutional law which requires a State to provide any particular kind of due process to the persons or entities with whom it contracts, absent some deprivation by the State of federally protected right or interest. The right to or interest in a continued contract without a breach by the State is not within the scope of federal constitutional protection.

I would affirm the summary judgment by the district court in favor of defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

---

No. CV 86-P-0696-S

MEDICAL LAUNDRY SERVICES, ETC.
*Plaintiff*;

vs.

BOARD OF TRUSTEES U.A., *et al.*,
*Defendants.*

---

[Filed Nov. 5, 1986]

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ORDER

In accordance with the accompanying Memorandum of Opinion, the court hereby GRANTS defendants' motion for summary judgment. This case is hereby DISMISSED. Costs are taxed against the plaintiff.

This the 4th day of November, 1986.

/s/ Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

---

No. CV 86-P-0696-S

MEDICAL LAUNDRY SERVICES, ETC.
*Plaintiff*;

vs.

BOARD OF TRUSTEES U.A., *et al.*,
*Defendants.*

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[Filed Nov. 5, 1986]

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## MEMORANDUM OF OPINION

This matter comes before the court on defendant's motion for summary judgment.[1] Plaintiff's complaint alleges a violation of 42 U.S.C. § 1983 which provides a remedy for the deprivation of rights, privileges and immunities secured by the Constitution or laws of the United States by anyone acting under "color of state law".[2] Specifically, plaintiff alleges that: (1) On or

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[1] Defendant's motion to dismiss was, on notice, treated as a motion for summary judgment because the defendants stated facts outside the complaint.

[2] Section 1983, in pertinent part, provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress".

about February 13, 1984, plaintiff and The Board of Trustees of the University of Alabama (Board) entered into a contract which contemplated plaintiff providing laundry services to University Hospital in Birmingham, Alabama beginning about March 19, 1984; (2) plaintiff began to provide laundry service to University Hospital under the provisions of this contract on or about March 19, 1984; (3) on April 10, 1984, the contract between the Board and the plaintiff was terminated by the Board acting by and through the individual defendants; and (4) plaintiff was deprived of a property right in violation of the due process requirements of the Fourteenth Amendment to the Constitution of the United States.[3] Plaintiff seeks injunctive, declaratory, and monetary relief.

Defendants' motion advances several alternative grounds for granting summary judgment in their favor. They are: (1) that the action against the Board and the other state officials is barred by the Eleventh Amendment to the Constitution of the United States; (2) that plaintiff has failed to state a cause of action under § 1983 because plaintiff has no protected property right subject to procedural due process; (3) that plaintiff was provided sufficient procedural due process through a post-deprivation hearing; and (4) that the action is barred by res judicata and collateral estoppel. Because the court finds that the plaintiff has failed to state a claim under § 1983, it is unnecessary for the court to reach the other grounds advanced by defendants.

In any § 1983 action the initial inquiry must focus on whether the two essential elements of a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and

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[3] The plaintiff also alleges a violation of substantive due process. There is no evidence in the record to support a finding that the termination violated the substantive due process protection afforded plaintiff. Therefore, summary judgment on this point is due to be GRANTED without further discussion.

(2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). The defendants do not dispute that they were officials acting under the authority provided by state law. The defendants do argue, however, that the plaintiff has failed to allege a deprivation which fulfills the second prong above.

Where, as here, a plaintiff is seeking to establish a due process claim under the Fourteenth Amendment for deprivation of property, the plaintiff must show: (1) the existence of a property right; (2) that the alleged loss of that property amounted to a deprivation; and (3) that the deprivation of the property right occurred "without due process of law". *Id.* at 536-37; *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

Plaintiff alleges that the contract between it and the Board of Trustees of the University of Alabama was a property right protected by the provisions of the Fourteenth Amendment. It is "well settled" that, in the Fourteenth Amendment due process context, the federal court looks to state law to determine whether the claimant has a protected property interest. *Stone Mountain Game Ranch, Inc. v. Hunt*, 746 F.2d 761 (11th Cir. 1984).[4] The Alabama law concerning whether an individual or other entity has a property right in contracts with the Board is contained in Article 1, Section 14 of the Constitution of the State of Alabama (1901), and decisions interpreting this section.

Article 1, Section 14, of the Alabama Constitution of 1901 provides "[T]hat the State of Alabama shall never be made a defendant in any court of law or equity". The

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[4] The Eleventh Circuit based this ruling on the decision of the Supreme Court in *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop v. Wood*, the Court stated that the sufficiency of a claim of entitlement must be decided by reference to state law. *Id.* at 344.

Supreme Court of Alabama, construing Section 14, has held "almost every conceivable type of suit" to be within this constitutional prohibition. *Hutchinson v. Board of Trustees of the University of Alabama*, 256 So.2d 281 (Ala. 1971).[5] *Hutchinson* involved a breach of contract action against the Board of Trustees of the University of Alabama d/b/a The University of Alabama Hospitals and Clinics. *Id.* There, as in this § 1983 action, the issue was the enforceability of the contract with the Board of Trustees. The Supreme Court of Alabama held that this suit was barred by the "almost invincible" governmental immunity enjoyed by the State of Alabama. *Id.*[6]

Additionally, the Supreme Court of Alabama has held that all persons dealing with the State are charged with the knowledge that no one has authority to subject the State to suit. *McDowell-Purcell, Inc. v. Bass*, 370 So.2d 942, 944 (Ala. 1979) (plaintiff bidding for contract with state highway department had constructive notice that it could not sue the state over a contract dispute); *Dunn*

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[5] This immunity extends to the state's institutions of higher education. *Ellison v. Abbott*, 337 So.2d 756 (Ala. 1976) (Jacksonville State University); Jefferson County Pharmaceutical Association v. Abbott Labs., 656 F.2d 92 (5th Cir. 1981) *rev'd on other grounds*, 460 U.S. 150 (1983) (Board of Trustees of the University of Alabama); Taylor v. Troy State University, 437 So.2d 427 (Ala. 1983); Rigby v. Auburn University, 448 So.2d 345 (Ala. 1984).

[6] The *Hutchinson* court also held that the operation of a hospital is a governmental function. *Hutchinson*, 256 So.2d 281 (Ala. 1971). The court went on to say that even if the operation of University Hospital is classified as a "business function", the State could not be sued. *Id.* Further, the court said that the State could not be sued indirectly by suing its officers or agents in their official capacity when the result would be to directly affect the state treasury. *Id.*; *see also Milton v. Espey*, 356 So2d 1201 (Ala. 1978) (Summary judgment granted because the University of Alabama is constitutionally immune from suit and this prohibition cannot be circumvented by suing the official or agent individually when the result would be to directly affect a contract or property right of the State.)

*Construction Co. v. State Board of Adjustment*, 234 Ala. 372, 175 So. 383 (1937).

Historically, a party aggrieved by the State, but barred from bringing suit, had only one method of seeking relief: The aggrieved party could seek a relief bill from the state legislature. In 1935, the Board of Adjustment was created by the legislature to relieve it of its burden of handling private relief bills and still fulfill its moral obligation to reimburse those injured by the State. *See Hawkins v. State Board of Adjustment*, 242 Ala. 547, 7 So.2d 775 (1942). While aggrieved parties can carry their claims to the Board of Adjustment, it is clear that the legislature did not, and in fact could not, create a forum with jurisdiction over claims against the State analogous to suits against the State. *Dunn Construction Co. v. State Board of Adjustment*, 234 Ala. 372, 376, 175 So. 383 (1937). Article 1, Section 14, wholly withdraws from the legislature, or any other state authority, the power to give consent to a suit against the state. *Id.* Therefore, the real purpose of the Board of Adjustment is to act as a matter of "grace" for the State in lieu of legislative action. *John E. Ballinger Construction Co. v. State Board of Adjustment*, 234 Ala. 377, 379, 175 So. 387 (1937). It follows that the creation and funding of the Board of Adjustment creates only a privilege to have a hearing regarding claims against the State and does not convert those claims into an enforceable property right. *See Turner v. Lumberman Mutual Insurance Co.*, 235 Ala. 632, 633, 180 So. 300 (1938); *Ballinger*, 234 Ala. at 380-81.

It is clear that Article 1, Section 14, of the Alabama Constitution prevents suits against the Board of Trustees of the University of Alabama and other state officials or agents for breach of contracts when the State is the contracting party. A person or entity who contracts with the State therefore has no legally protected "property right"

under state law. As a result, this court holds that plaintiff has failed to state a claim under § 1983. Defendants' motion for summary judgment is therefore due to be GRANTED. A separate Order will be entered to this effect.

This the 4th day of November 1986.

/s/ Sam C. Pointer, Jr.
United States District Judge

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

### Constitution of Alabama, Section 14

That the State of Alabama shall never be made a defendant in any court of law or equity.

### Section 41-9-60, Code of Alabama (1975)

The purpose of this division is to provide a method of payment by the state of Alabama or any of its agencies, commissions, boards, institutions or departments to persons for injuries to person or property or for death occasioned by the state of Alabama or any of its agencies, commissions, boards, institutions or departments where in law, justice or good morals the same should be paid.

### Section 41-9-61, Code of Alabama (1975)

There shall be a board of adjustment to be composed of the director of finance, the state treasurer, the secretary of state and the state auditor. The chairman of said board shall be selected by the board from its members. The secretary of state shall also be the secretary of said board and shall perform all the duties, powers and functions required of the secretary by the board. The attor-

ney general shall attend the meetings of the board and represent the state of Alabama in all proceedings before the board.

The board of adjustment shall be furnished with necessary quarters, stationery and postage in the same manner as the same are furnished to other state officers, agencies, commissions, boards, institutions or departments.

Any three of said board members shall constitute a quorum to transact business and discharge the functions of said board; provided, however, that in case there is an equal division of opinion on any decision or claim that the board is authorized to hear, the chairman of the board shall determine the decision in such instance.

The board of adjustment shall have the power, if, in its opinion the situation warrants it, to visit any scene of any injury or accident and make a view thereof and take said facts in consideration and personally interview such persons as may have knowledge or information as to the subject matter of the claim under consideration by said board and may take such views and information into consideration in reaching its conclusion and making awards on claims.

The board of adjustment shall supervise and direct the secretary of the board as to making a record as provided in section 41-9-71 and shall aid and direct said secretary in making up a report of all cases heard and determined by said board, stating the substance of the claim and the disposition made of the case, and shall cause said cases to be classified under said board's direction in accordance with the types and kinds of cases coming before said board.

Section 41-9-62(a)(5), (b) Code of Alabama (1975)

(a) The board of adjustment shall have the power and jurisdiction and it shall be its duty to hear and consider:

(5) All claims against the state of Alabama or any of its agencies, commissions, boards, institutions or departments arising out of any contract, express or implied, to which the state of Alabama or any of its agencies, commissions, boards, institutions or departments are parties, where there is claimed a legal or moral obligation resting on the state;

(b) The jurisdiction of the board of adjustment is specifically limited to the consideration of the claims enumerated in subsection (a) of this section and no others; provided, that nothing contained in this division shall confer upon the board of adjustment any jurisdiction now conferred by law upon the state board of compromise provided for in sections 41-1-3 and 41-1-4, and nothing contained in this division shall be construed to confer jurisdiction upon the board of adjustment to settle or adjust any matter or claim of which the courts of this state have or had jurisdiction; provided further, that the board of adjustment shall have no jurisdiction over claims growing out of forfeitures or of contracts with any state agency, commission, board, institution or department where, by law or contract, said state agency, commission, board, institution or department is made the final arbiter of any disagreement growing out of forfeitures or of contracts of said state agency, commission, board, institution or department, and, particularly, the board of adjustment shall have no jurisdiction of disagreements arising out of contracts entered into by the highway department.

Section 41-9-66, Code of Alabama (1975)

The board of adjustment may prescribe such forms and adopt such rules of evidence and procedure as it may deem necessary or proper, not inconsistent with the provisions of this division.

Section 41-9-68, Code of Alabama (1975)

(a) When claims are properly prepared and presented to the board of adjustment and, after ascertaining the facts in the case, it is directed to determine the amount of the injury, death or disability or other injury or damage arising from contract or business and to fix the damages, using as its guide, when applicable, the ordinary rules of negligence and workmen's compensation laid down by the courts and the moral obligation of the state of Alabama, and to award and find the person entitled to payment and the amount, if any, which should be paid and any other facts necessary for a proper adjustment of claims. The ordinary rules of negligence as to liability are to be followed in claims by parties not employees of the state of Alabama or any of its agencies, commissions, boards, institutions or departments. The rules of chapter 5 of Title 25 as to liability are to be followed in claims for personal injury or death of employees of the state of Alabama or of any of its agencies, commissions, boards, institutions or departments and also in claims for the injury or death of convicts.

(b) Whenever the provisions of this division authorize ascertainment of the amount of damages and provide for payment of the judgment, finding or award of the board of adjustment, they shall be construed to include also claims arising from contract or business dealings as well as for personal injury, property damage, death and disability.